IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-925

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING CO., *Petitioners*,

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

and

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL No. 610, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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STATUTE:

Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*); 29 U.S.C. § 160(l) 2, 3, 4, 5, 6

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I.

INTEREST OF THE AMICUS CURIAE.

This brief is filed on behalf of the Chamber of Commerce of the United States of America (herein, "the Chamber"), a federation with a membership of over 3,700 state and local chambers of commerce and trade associations, an underlying membership of about five

million business firms and individuals, and a direct business membership in excess of 32,000.[1]

This case poses important unresolved questions concerning the scope of procedural rights available to a charging party in a district court proceeding instituted by the Regional Director of the National Labor Relations Board (herein "the Board") to enjoin unlawful secondary boycott activity. This case is one of three now pending before the Court on petitions for writs of certiorari involving related aspects of such proceedings under Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*, hereafter referred to as "the Act"), 29 U.S.C. § 160(1). Commonly referred to as the *Solien* trilogy, the cases are *Solien II*,[2] *Solien III*[3] and the instant case *Solien IV*. As more fully explicated in the Chamber's brief *amicus curiae* filed in *Solien III*, this series of cases poses a network of important issues in an area of procedural rights under Section 10(1) to which this Court has never addressed itself. As these rights critically affect the ability of employer-charging parties to obtain adequate relief from secondary boycotts, the Chamber, its affiliates and members have a direct and vital interest in an authoritative resolution of those questions by the Court.

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[1] This brief is filed with the written consent of all parties hereto pursuant to Supreme Court Rule 42(1).

[2] *Terminal Freight Handling Co. and Terminal Freight Cooperative Association* v. *Joseph H. Solien*, 444 F.2d 699 (8th Cir., 1971), pet. for cert. pending in No. 71-609.

[3] *Sears, Roebuck and Co., Terminal Freight Cooperative Association and Terminal Freight Handling Company* v. *Joseph H. Solien*, — F.2d —, 78 LRRM 2700 (8th Cir. 1971), pet. for cert. pending in 71-924.

Accordingly, the Chamber respectfully requests the Court to consider its views on the issues herein which are of serious national concern.

II.

REASONS FOR GRANTING THE WRIT.

In the instant case, the district court below denied the Petitioners, who were the charging parties, the right to be present at and participate in a critical stage of the proceedings which was determinative of the relief sought. Though that court had earlier recognized the right of the charging parties in the 10(1) action to participate in all proceedings, and indeed had accorded them a hearing on their objections to the settlement stipulation, it failed to grant such rights before approving a subsequent stipulation. This wholly anomalous result springs, we suggest, from the ambiguity which has too long existed as to the scope of the charging party's status in such a proceeding.

Although Section 10(1) of the Act provides that the charging party shall have the right "to appear by counsel and present any relevant testimony", there has been no interpretive gloss by the courts which further specify or define those rights. Thus, the Ninth Circuit in a pioneer case sustained the power of the district court to grant relief urged by a charging party, but to which the Regional Director of the Board objected. *Retail Clerks Union* v. *Food Employers Council, Inc.*, 351 F.2d 525 (1965). However, it observed at page 529, footnote 2:

> ". . . [W]e have not found it necessary to define the limits of the scope of participation to be permitted the charging parties. However, even if we agree with the Regional Director that it was the

charging parties who had procured the injunction, we cannot conclude that this would necessarily have constituted reversible error. The strict dichotomy between public and private interests which the Regional Director espouses in his effort to limit the participation of the charging parties has been subjected to well deserved criticism. In Comment, 'The Charging Party Before the NLRB: A Private Right In the Public Interest,' 33 U. Chi. L. Rev. 786 (1965), it is argued that in unfair labor practice proceedings before the NLRB the charging parties not only should, but do, have a right to a hearing when they object to a proposed settlement. * * * We agree, and find no inconsistency in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so."

Citing *Retail Clerks, supra*, with approval, this Court affirmed "that the public right (does not) exclude . . . recognition of parochial private interests . . ." and observed, "(r)ather, the two interblend in the intricate statutory scheme." *United Automobile Workers, etc. v. Scofield*, 382 U.S. 205, 218, 220 (1965). Thus, as it is generally recognized that participatory rights of some nature exist for charging parties under Section 10(1), it would be anomolous to leave those rights undefined without any indication as to when and in what manner they may be exercised.

The extent of these rights raises significant questions concerning the interpretation of an important federal statute. What little the courts have said about such rights is in utter conflict. The Tenth Circuit, in *Sears, Roebuck & Co. v. Carpet, Etc., Local Union No. 419*, 410 F. 2d 1148, at 1150 (1969), espoused the strictly literal view that the charging party is limited to ap-

pearing by counsel and presenting testimony, "no more and no less". The Eighth Circuit echoed the same rhetoric in *Solien* v. *Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F. 2d 424, 130 (1971), cert. den. 403 U.S. 905 (*Solien I*). However, the Ninth Circuit in *Retail Clerks Union* v. *Food Employer's Council, Inc., supra*, recognized that the statutory language of necessity implied more and created in the charging party the status, very nearly, if not wholly, of a full litigant. The Eighth Circuit also implicitly acknowledged as much in *Solien II, supra*, when it charged the district court with the responsibility of setting aside the Regional Director's proposed stipulation offered in lieu of an injunction should it fail to uphold the public interest. 444 F.2d 699 at 709. For the charging party is the only participant in a position to expose such infirmities to the court and therefore must have been thought by the court to have standing to object and argue its views, a status which goes well beyond that of merely being present and calling witnesses.

Moreover, the unresolved questions raised here daily confront litigants engaged in Section 10(1) proceedings. Without a resolution by the Court of these conflicts, the conduct of Section 10(1) actions will be plagued by disruptive uncertainty and the parties will have not even the most fundamental standards on which to base informed decisions concerning litigation and settlement.

Finally, the extended scope of the charging parties' rights advocated by the Petitioners are vital to vigorous and effective enforcement of the Act. In order for private interests to spur adequate enforcement when "the representative of the NLRB is either unable or unwilling to do so", *Retail Clerks, supra*, 351 F. 2d at

529, n. 2, they must have the same access to the Court as the other parties. Further, they must have access to the same evidentiary data as the Regional Director so as to evaluate the appropriateness of the relief sought. Finally, they should have direct access to the district court should the terms of any stipulation be violated, and the Regional Director's efforts thus proven futile, to obtain the relief guaranteed by Section 10(1) of the Act.

III.

CONCLUSION.

We believe these important questions warrant the consideration of the Court and accordingly urge that the petition for writ of certiorari be granted.

Respectfully submitted,

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